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Counsel to the Debtors and
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

- - - - - x
In re: : Chapter 11
:
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)
et al., :
:
Debtors. : Jointly Administered
- - - - - x

**DEBTORS' SUPPLEMENT TO THE NINETEENTH OMNIBUS OBJECTION
TO CLAIMS (RECLASSIFICATION OF CERTAIN MISCLASSIFIED
CLAIMS TO GENERAL UNSECURED, NON-PRIORITY CLAIMS) WITH
RESPECT TO THE CLASS CLAIM FILED BY ROBERT GENTRY**

The debtors and debtors in possession in the

above-captioned cases (collectively, the "Debtors")¹, pursuant to sections 105, 502 and 503 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 3007, 7056, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 56 of the Federal Rules of Civil Procedure (the "Civil Rules"), submit this supplement (the "Supplement") to the Debtors' Nineteenth Omnibus Objection² (as defined herein) (together with the Nineteenth Omnibus Objection, the "Objection") with respect to the Class Claim (as defined herein) filed by Robert Gentry ("Gentry"). In support of this Supplement, the Debtors respectfully represent as follows:

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, INC. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. The address for the Debtors is 4951 Lake Brook Drive, Suite #500, Glen Allen, VA 23060.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

PRELIMINARY STATEMENT

1. By the Nineteenth Omnibus Objection, the Debtors sought to reclassify the Class Claim from a priority claim to a pre-petition general unsecured, non-priority claim. Contemporaneously herewith, the Debtors filed a motion for summary judgment in support of that relief.

2. By this Supplement, the Debtors seek to disallow the Class Claim to the extent that it seeks relief with respect to any unnamed individuals (each an "Unnamed Claimant" and, collectively, the "Unnamed Claimants") and, consequently, if granted, to reduce the Class Claim to a claim solely asserted by Gentry on his own behalf (as defined herein, the "Gentry Claim"). As set forth above, however, the Debtors are moving for summary judgment with respect to the Gentry Claim asserting that it must, as a matter of law, be reclassified a general, unsecured, pre-petition claim subject to further objections by the Debtors or their successors on any grounds that governing law permits.

BACKGROUND

3. The Debtors hereby incorporate by reference the Background set forth in the Nineteenth Omnibus Objection as if fully set forth herein and provide the Court with the following additional background information.

A. The General Bar Date.

4. On November 12, 2008, the Court appointed Kurtzman Carson Consultants LLC ("KCC") as claims, noticing and balloting agent for the Debtors in these chapter 11 cases, pursuant to 28 U.S.C. § 156(c) (D.I. 108).

5. On December 10, 2008, the Court entered that certain Order Pursuant to Bankruptcy Code Sections 105 and 502 and Bankruptcy Rules 2002, 3003(c)(3), and 9007 (I) Setting General Bar Date and Procedures for Filing Proofs of Claim; and (II) Approving Form and Manner of Notice Thereof (D.I. 890) (the "Claims Bar Date Order").

6. Pursuant to the Claims Bar Date Order, the deadline for filing all "claims" (as defined in 11 U.S.C. § 105(5)) arising before November 10, 2008

against the Debtors by any non-governmental entity was 5:00 p.m. (Pacific) on January 30, 2009 (the "General Bar Date").

7. On December 19, 2008, KCC served a copy of the Claims Bar Date Notice (as defined in the Claims Bar Date Order) on, among others, the counsel that represented Gentry (the "Class Counsel") in the pending lawsuit styled as Robert Gentry et al. v. Circuit City Stores, Inc. (the "Class Action"). In addition, the Debtors published the Claims Bar Date Notice in The Wall Street Journal (D.I. 1395) and The Richmond Times-Dispatch (D.I. 1394).

B. Procedural Background.

8. On January 13, 2009, Class Counsel filed the Class Claim on behalf of Gentry and the Unnamed Claimants, which Unnamed Claimants are alleged "all those similarly situated" to Gentry in the amount of \$7,070,131.60, which Class Claim was asserted as being entitled to priority treatment under 11 U.S.C. § 507(a)(4) (Claim No. 6039, the "Class Claim"). A copy of the proof of claim is attached as Exhibit A.

9. On June 22, 2009, the Debtors filed the Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) (D.I. 3703; the "Nineteenth Omnibus Objection"). By the Nineteenth Omnibus Objection, the Debtors seek to reclassify certain filed claims, including the Class Claim, to a pre-petition general unsecured, non-priority claim.

10. Gentry filed a preliminary response to the Nineteenth Omnibus Objection. (D.I. 4956, the "Response"). In the Response, Gentry contends that reclassification of the Class Claim is improper. See Response, p.2 ("To the extent that Plaintiff and the putative class worked for Debtors 180 days prior to the Petition Date and were not paid all wages due and owing, Creditor Gentry's claim is properly classified as "Priority".").

11. By supplemental order dated September 2, 2009, (the "Supplemental Order"), the Objection was adjourned with respect to the Class Claim.

C. The Class Action Complaint.

12. The Class Claim is premised on the Class Action. A copy of the complaint filed in the Class Action is attached as Exhibit B (the "Class Action Complaint"). The Class Action Complaint was filed in Los Angeles Superior Court in California on August 29, 2002 -- more than 6 years prior to the Petition Date. As a result of the Debtors' bankruptcy, the Class Action was stayed. As of the Petition Date, no class had been certified.

13. In the Class Action Complaint, Gentry sought, on behalf of himself and allegedly on behalf of similarly situated parties, two forms of relief. First, Gentry seeks damages for conversion, as well as violations of the California Labor Code and Business and Professions Code. See Gentry Complaint, pp. 5, 13. Second, Gentry sought injunctive relief against Circuit City on account of the alleged labor violations. See Gentry Complaint, p. 12.

D. The Class Claim.

14. By the Class Claim, Gentry asserts that Circuit City violated California labor laws entitling

Gentry and the Unnamed Claimants to the payment of overtime wages and waiting time penalties for the period from August 29, 1998 to March 31, 2001. See Claim No. 6039 Exhibit A at 1 ("The calculations were arrived at by using the dates of August 29, 1998 to March 31, 2001.").

15. Specifically, the Class Claim is broken into various parts. First, the Claim seeks \$5,016,640.80 for overtime pay by using the following formula: (hourly rate x 1.5) x (overtime per week) x (work weeks) x (number of Circuit City stores) (the "Overtime Damages"). The Overtime Damages are divided between Gentry's portion, which totals \$69,674.40 (the "Gentry Overtime Claim"), and the Unnamed Claimants' portion, which allegedly totals \$4,946,966.40 (the "Unnamed Claimants Overtime Claim").

16. Second, the Class Claim includes \$509,385.60 for waiting time penalties by using the following formula: (hourly rate) x (hours worked per day) x (30 days) x (number of employees employed at Circuit City) (the "Waiting Time Damages"). The Waiting Time Damages are also divided between Gentry's portion,

which allegedly totals \$3,691.20 (the "Gentry Waiting Time Claim"), and the Unnamed Claimants' portion, which allegedly totals \$505,694.40 (the "Unnamed Claimants Waiting Time Claim").

17. Thus, Gentry's Overtime Claim and Waiting Time Claim aggregates to \$73,365.60 (the "Gentry Claim") and the Unnamed Claimants' Overtime Claim and Waiting Time Claims aggregate to \$5,452,660.80 (the "Unnamed Claimants' Claim").

18. Third, and finally, the Class Claim also includes \$1,544,105.20 on account of attorneys' fees, presumably for Class Counsel (the "Attorneys' Fee Claim").

E. Gentry's Employment.

19. Prior to 2001, Gentry was employed by one or more of the Debtors. At some point during 2001, Gentry ceased to be employed by any of the Debtors. Claim No. 6039 Exhibit A at 1 ("The company eliminated [Gentry's] [sic] in 2001.").

SUPPLEMENTAL RELIEF REQUESTED

20. Subject to the reservation of rights set forth herein and in addition to seeking to reclassify

the Class Claim to a general unsecured, non-priority claim, by the Objection, the Debtors seek to disallow the portions of the Class Claim seeking payment on account of the Unnamed Claimants' Claim and the Attorneys Fee Claim (the "Non-Gentry Class Claims").

BASIS FOR RELIEF

21. Class counsel filed the Class Claim on behalf of Gentry and the Unnamed Claimants as a class proof of claim. Prior to doing so, however, Gentry was not certified as the class representative in the Class Action. Indeed, no class has ever been certified despite the fact that the Class Action was commenced over 7 years ago. More importantly, neither Gentry nor Class Counsel has ever sought this Court's approval to file a class proof of claim as required by Bankruptcy Rules 9014 and 7023, and granting any such relief at this time, would be severely prejudicial to the Debtors. Consequently, for this and the further reasons set forth below, the Non-Gentry Class Claims should be disallowed in their entirety.

APPLICABLE AUTHORITY

I. THE NON-GENTRY CLASS CLAIMS SHOULD BE DISALLOWED.

A. Gentry Was Required To Seek The Bankruptcy Court's Permission To File A Class Proof Of Claim.³

22. Bankruptcy Rule 7023 provides that Civil Rule 23 -- the class action rule -- applies in adversary proceedings. Fed. R. Bankr. P. 7023 ("Rule 23 F.R.Civ.P. applies in adversary proceedings."). Bankruptcy Rule 7023 does not, however, apply to the filing of claims or in contested matters absent leave of court. See Fed. R. Bankr. P. 9014 ("The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply."); see also In re American Reserve Corp., 840 F.2d 487, 488 (7th Cir. 1988) ("the right to file a proof of claim on behalf of a class seems secure, at least if the

³ At this time, among other matters, the Debtors have not addressed whether class certification would be appropriate as it would necessarily require fact intensive consideration. See In re Bally Total Fitness of Greater New York, Inc., 402 B.R. 616, 621 (Bankr. S.D.N.Y. 2009) (noting the Supreme Court's directive to district courts to conduct a "rigorous analysis" to determine whether the requirements of Civil Rule 23 have been met). However, in the event that the Court denies the Objection, the Debtors reserve their rights to object to the Claim on any grounds, including (without limitation) that the requirements of Civil Rule 23 have not been satisfied and the Debtors are not liable for the Claim.

bankruptcy judge elects to incorporate Rule 23 via Rule 7023 via Rule 9014." (emphasis added)).

23. Indeed, as the Bankruptcy Court for the Eastern District has stated, "although class proofs of claim may be permitted, they are not a matter of right." See In re Computer Learning Centers, Inc., 344 B.R. 79, 85-86 (Bankr. E.D. Va. 2006); see also In re American Reserve Corp., 840 F.2d at 494 (holding Federal Rule of Civil Procedure 23 governing class actions "may apply throughout a bankruptcy case at the bankruptcy judge's discretion"). Therefore, prior to filing a class proof of claim, a claimant must file a motion for determination of applicability of Bankruptcy Rule 7023. See Computer Learning, 344 B.R. at 86 ("The applicability of Rule 7023 is raised by motion."). Neither Gentry nor Class counsel ever made such a request.

24. Specifically, this Court set the General Bar Date by order dated December 10, 2008. D.I. 890. KCC served Class Counsel, Gentry, the Debtors employees and many others with the Claims Bar Date Notice on December 19, 2008, and the General Bar Date passed over

one year ago.⁴ Yet, to date, neither Gentry nor Class Counsel has moved for Court approval to file a class proof of claim. Consequently, Gentry and Class Counsel were simply not eligible to file a class proof of claim, and the portion of the Class Claim seeking payment on the Non-Gentry Class Claim must be denied. See Computer Learning, 344 B.R. at 87 ("[W]ithout [a court order], Rule 7023 is not applicable to the proof of claim and a class proof of claim is improper."); see also White Motor Corp., 886 F.2d at 1470-71 (finding the bankruptcy court did not abuse discretion in denying a class proof of claim where the claimant "failed to timely petition the bankruptcy court to apply the provisions of Rules 9014 and 7023").

25. Accordingly, the Non-Gentry Class Claims should be disallowed in their entirety and the Class Claim should be reduced to reflect only the Gentry Claim, with the Debtors' rights to object on to the

⁴ See Affidavit of Service of Evan Gershbein re: 1) Notice of Deadline for Filing Proofs of Claim and Proof of Claim Form [D.I. 966]; and 2) Notice of Commencement of Chapter 11 Bankruptcy Cases, Meeting of Creditors and Fixing of Certain Dates [D.I. 967], at p. 1748, (D.I. 1314).

Gentry Claim on any additional grounds that governing law permits.

B. Even If Gentry or Class Counsel Had Filed A Timely Motion Under Bankruptcy Rule 7023, The Dismissal Of Such Motion Would Have Been Proper.

26. Even if Gentry or Class Counsel had filed a motion seeking authorization to file a class proof of claim in these cases, the proper exercise of this Court's discretion would have dictated that the motion be denied.

27. In particular, in this jurisdiction, there are four considerations that are relevant to a court's determination as to whether to allow the filing of a class proof of claim. These considerations are: (i) whether the request to make Rule 7023 applicable to the filing of a proof of claim is timely; (ii) whether class adjudication is superior to the adjudication of individual claims in bankruptcy; (iii) whether a class proof of claim would unduly complicate or delay the administration of the bankruptcy case; and (iv) whether adjudication of the class proof of claims provides benefits and limits the costs of claims litigation.

Computer Learning, 344 B.R. at 86 (citing American Reserve, 840 F.2d at 492-94; White Motor Corp., 886 F.2d at 1463-64).

28. In considering these factors, courts have recognized that certain aspects unique to bankruptcy law may make application of the class action rules unnecessary in that context. Computer Learning, 344 B.R. at 86 (citing American Reserve, 840 F.2d at 492-94). These aspects include the bankruptcy court's control over the debtor and its property, special notice of the bankruptcy proceedings, and the opportunity to file individual proofs of claim. Id. (citations omitted).

1. **Any request to file a class proof after the passing of the General Bar Date would have been untimely.**

29. While Bankruptcy Rule 9014 does not provide a deadline for filing a Bankruptcy Rule 7023 motion, it "should be filed as soon as practicable and should be denied if it comes so late as to prejudice any party." Computer Learning, 344 B.R. at 89 (emphasizing that early application of Rule 7023 "furthers the policy

of an orderly and expeditious administration of the bankruptcy estate").

30. Neither Gentry not Class Counsel has ever filed a motion for an order under Bankruptcy Rule 7023 for authorization to file the Class Claim. Moreover, even if Gentry or Class Counsel were to do so today, the Debtors and their creditors would be significantly prejudiced by permitting the filing and prosecution of the Class Claim this late into the administration of their chapter 11 cases. See Computer Learning, 344 B.R. at 90 (noting that the trustee was prejudiced by the delay in filing the Rule 7023 motion because he could have included the class action allegations in his analysis and settlement of claims and payments to creditors would be delayed indefinitely by the permission of a class proof of claim).

31. Specifically, this Court approved the Disclosure Statement on September 24, 2009. In formulating the disclosure statement, the Debtors did not include the Alleged Class Claim (or other similar claims filed by the same and different counsel) for purposes of determining the range of priority claims

that would need to be paid before general unsecured creditors. Indeed, the Debtors were only aware of one class claimant who sought and obtained permission to file a class proof of claim.⁵ Thus, if the Court permits Gentry or the Class Counsel to proceed on the Class Claim in the stated amount and as a priority claim, the classes of claims and projected distributions set forth in the Disclosure Statement might need to be revised. Plainly, that would delay the administration of the case and ultimate distribution to unsecured creditors, to whom distributions are made only after priority claims are paid in full. D.I. 5124 (Provided that the Face Amount of all Administrative Claims, Priority Claims and Miscellaneous Secured Claims have been paid in full . . . each Holder of an Allowed General Unsecured Claim shall receive its Pro Rata share . . .").

32. Even assuming, however, that permitting the filing of a class proof of claim at this stage of

⁵ See D.I. 1683 (Stipulation and Order Granting Motion to Permit the Filing of a Class Proof of Claim by Christopher A. Jones of Whiteford, Taylor & Preston, LLP on Behalf of Daniel E. Weidler, Michael F. Yezback, Eloise Garcia, and Angie Duron). It is worth noting that Weidler's motion to file a class proof of claim was a matter of public record and was available on this Court's docket as of the date Gentry filed the Claim.

these cases would be timely, as discussed below, Gentry could not satisfy the remaining criteria.

2. Proceeding with the Class Claim is inferior to individual claim adjudication.

33. A bankruptcy court's analysis regarding whether to apply Bankruptcy Rule 7023 and allow the filing of a class proof of claim generally mirrors the analysis required in determining whether to certify a class under Civil Rule 23(b)(3): whether questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. See Computer Learning, 344 B.R. at 91 (quoting Civil Rule 23(b)(3)). While the analysis under Bankruptcy Rule 7023 may be similar in concept, the bankruptcy court should consider and weigh the factors differently within the context of a bankruptcy because the class process may be inferior to the bankruptcy claims process. See In re Musicland Holding Corp., 362 B.R. 644, 651 (Bankr. S.D.N.Y. 2007) (quoting In re Ephedra Prods. Liab. Litig., 329 B.R. 1,

5 (S.D.N.Y. 2005)) (“[B]ankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and . . . class certification may be less desirable in bankruptcy than in ordinary civil litigation.” (internal quotations and citations omitted)). As one court aptly noted, “superiority of the class action vanishes when the ‘other available method’ is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost.” See Ephedra, 329 B.R. at 9.

34. Indeed, as one court in this District recognized, Bankruptcy already provides the same, if not more, procedural advantages than class adjudication. See Computer Learning, 344 B.R. at 92 (explaining that “[a] bankruptcy case presents many of the same mechanisms to process large numbers of claims as a class action”). Specifically, bankruptcy provides (i) established mechanisms for notice, (ii) established mechanisms managing large numbers of claimants, (iii) proceedings centralized in a single court with nationwide service of process, and (iv) protection

against a race to judgment since all of the debtor's assets are under the control of the bankruptcy court. Id.; see also Musicland Holding Corp., 362 B.R. at 650-51, n. 8 (noting that bankruptcy provides more advantages than a class action and emphasizing the ease of participating in distributions from the bankruptcy estate and the fact that claims are "deemed allowed" under section 502(a) in the absence of an objection).

35. In this case, nearly 15,000 claims were filed against the Debtors. While the Class Claim and the Gentry Complaint do not provide the number of potential class members, even a few hundred or a thousand more claims would not have been difficult to process. See, e.g., Computer Learning, 344 B.R. at 94 (finding that the claimant's Rule 7023 motion would still have been denied if it was timely because the trustee could have easily reviewed 100 additional claims in a case where over 2,000 claims were filed).

36. Moreover, the Debtors provided actual and publication notice to their known and unknown creditors and afforded them an opportunity to file a proof of claim. See, supra, at ¶ A, n. 7. If any Unnamed

Claimant filed a claim for overtime or waiting time damages, such claim would be duplicative of the Non-Gentry Class Claim. Consequently, that individual's claim would need to be adjudicated in the context of the claims administration process regardless of whether this Court authorized the filing of the Non-Gentry Class Claims.

37. More importantly, perhaps, this Court will need to address Gentry's Claim and each Unnamed Claimant's Claim individually. Specifically, Gentry and each Unnamed Claimant are different and the facts underlying Gentry's alleged claim and each Unnamed Claimant's alleged claim are different. Indeed, Gentry was longer employed after 2001, while other Unnamed Claimants may have been terminated prior to or after that date. Consequently, this Court will need to address each claimant's claim separately in the bankruptcy claim process.

3. **Permitting Gentry or the Class Counsel to proceed on the Non-Gentry Class Claims would unduly complicate and delay the administration of these cases.**

38. Another reason for denying Gentry or Class Counsel the right to proceed on the Class Claim in general and the Non-Gentry Class Claims in particular is that doing so would unduly complicate and delay the administration of these cases. First, bar dates are important to the orderly administration of any bankruptcy proceeding for both the debtors and the creditors. See Computer Learning, 344 B.R. at 79 (noting that the bar date is important to the orderly administration of a case and prevents delays in distributing funds to creditors); In re Protected Vehicles, Inc., 397 B.R. 339, 346 (Bankr. D. S.C. 2008) (noting that a bar date is "necessary to provide finality in determining the identity of claimants and the liability faced by the bankruptcy estate"). "The requirement of a Bar Date in Chapter 11 enables the debtor . . . to establish the universe of claims with which it must deal and the amount of those claims." In re A.H. Robins Co., 129 B.R. 457, 459 (Bankr. E.D. Va. 1991).

39. When a class proof of claim is properly requested and approved by the bankruptcy court,

restricting the class to members who have, individually, timely filed their own proofs of claim preserves the orderly administration of a case provided by bar dates. See In re Protected Vehicles, Inc., 397 B.R. at 347 (finding that opening a class to include all employees regardless of whether a proof of claim was timely filed would "render proof of claim deadlines in bankruptcy cases meaningless"); In re Adam Aircraft Industries, Inc., 2009 WL 21000929 at *9 (Bankr. D. Colo. 2009) (denying a class proof of claim and stating that, "In the case at bar, the employees have already been afforded one bite at the claims apple, and Scoggin has not demonstrated a reason why they should receive a second."); In re Bill Heard Enterprises, Inc. 400 B.R. 795, 805 (Bankr. N.D. Ala. 2009) (stating that "[t]he Court further finds that the class is due to be restricted to those employees that file proofs of claim prior to the bar date...").

40. Here, however, the Debtors do not know whether any or all of the Unnamed Claimants filed proofs of claim before the General Bar Date. To the extent that they did not, but are now permitted to obtain a

recovery through the Class Claim, the result would reduce the recovery, and therefore prejudice, the unsecured creditors that timely filed proofs of claim. This is especially true because the Class Claim is filed as a priority claim and, thus, would receive, full payment in full. Cf. In re Bally Total Fitness of Greater New York, Inc., 402 B.R. 616, 622 (Bankr. S.D.N.Y. 2009) (denying class proof of claim because, in part, "the de facto expansion of the [b]ar [d]ate for notified class members who failed to file individual claims in a timely manner will violate due process and prejudice the rights of timely filers").

41. Moreover, the claim administration process will be burdened with additional time consuming claim reconciliations on an individual basis for Gentry and the Unnamed Claimants. Specifically, to the extent that the Unnamed Claimants were employed as of the Petition Date and received post-petition payments on account of pre-petition priority claims, the claim administration process would be further complicated by calculating the amount each Unnamed Claimant would be entitled to as a priority claim under the Class Claim.

This Court would need to reduce each Unnamed Claimant's portion of the Class Claim by the amount such Claimant has already received. Similarly, if an Unnamed Claimant filed a priority claim for amounts other than the damages sought in the Class Claim, this Court would also need to take such priority claim into consideration in reconciling the Class Claim. Undoubtedly, this process would be burdensome and time consuming.

42. Consequently, allowing a class proof of claim would unduly complicate and delay the administration of the Debtors cases.

4. The costs of litigating the Class Claim outweigh the benefits.

43. While class action lawsuits are often lauded for their ability to permit many people with small claims to seek redress where cost might otherwise be prohibitive as compared to the potential recovery, such concerns are not persuasive when bankruptcy is the alternative method of adjudication. Ephedra, 329 B.R. at 9 ("superiority of the class action vanishes when the 'other available method' is bankruptcy . . ."). This is true because the bankruptcy "consolidates all claims in

one forum and allows claimants to file proofs of claim without counsel and at virtually no cost." Id.

44. In evaluating the costs and benefits associated with allowing a class proof of claim, bankruptcy courts have significant discretion. See Ephedra, 329 B.R. at 10 (stating that "[t]he Court has discretion under Rule 9014 to find that the likely total benefit to the class members would not justify the cost to the estate of defending a class action under Rule 23."). Indeed, if resolving the class claim has the potential to interfere with distributions to creditors, that fact "itself presents sufficient grounds to expunge the class claims." Id. at 5.

45. Here, the Class Action has been pending for over six years. To resolve the Class Action the parties would need to engage in at least three stages of discovery - first with respect to class certification, second with respect to the underlying liability, and third with respect to damages. In addition, the parties would be compelled to address various procedural issues that are not common to traditional bankruptcy claim administration. In particular, the Debtors would be

required to provide one or more additional notices to the members of any class certified. As a result, the Debtors limited assets would be depleted to the detriment of the Debtors other creditors. See Bally Total Fitness, 402 B.R. at 621 (finding that class certification adds layers of procedural and factual complexity to a case, which can "siphon the Debtors' resources").

46. Furthermore, although one benefit of a class action may be deterring future conduct by the defendant, no such possible benefit is present in this case because the Debtors are no longer operating and are liquidating. See Ephedra, 329 B.R. at 9 ("Under the Bankruptcy Code, general deterrence is not promoted at the expense of creditors. Whatever weight deterrence may have in a true reorganization, it has none in a liquidating plan like the one here.").

47. Accordingly, for the reasons stated above, the Non-Dentry Class Claims should be disallowed and only the Gentry Claim should remain, subject to the Debtors right to object to such claim on any grounds governing law permits.

RESERVATION OF RIGHTS

48. At this time, the Debtors have not completed their review of the validity of all claims/expenses filed against their estates, including the Claim. The Debtors reserve the right to further object to any and all claims, whether or not the subject of the Objection, for allowance, voting, and/or distribution purposes, and on any grounds that bankruptcy or non-bankruptcy law permits. Furthermore, the Debtors reserve the right to modify, supplement and/or amend the Objection as it pertains to the Claim herein or to Gentry and file additional objections to the Claim, the Gentry Claim, and the Alleged Class Claim and nothing herein shall prejudice such rights.

NOTICE

49. Notice of this Objection has been provided to Gentry and to those parties entitled to notice under the Supplemental Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management and

Administrative Procedures (D.I. 6208; the "Case Management Order").

WAIVER OF MEMORANDUM OF LAW

50. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Objection, the Debtors request that the requirement that all motions be accompanied by a written memorandum of law be waived.

NO PRIOR RELIEF

51. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, the Debtors request the Court to enter the Order sustaining the Objection and granting such other and further relief as the Court deems just and proper.

Dated: Richmond, Virginia SKADDEN, ARPS, SLATE, MEAGHER &
February 25, 2010 FLOM, LLP
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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In re: : Chapter 11
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CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)
et al., :
:
Debtors. : Jointly Administered
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**ORDER PARTIALLY SUSTAINING THE DEBTORS NINETEENTH
OMNIBUS OBJECTION TO CLAIMS (RECLASSIFICATION OF CERTAIN
MISCLASSIFIED CLAIMS TO GENERAL UNSECURED, NON-PRIORITY
CLAIMS), AS SUPPLEMENTED, WITH RESPECT TO THE CLASS
CLAIM FILED BY ROBERT GENTRY**

Upon consideration of the supplement to the
Nineteenth Objection to Claims (Reclassification of
Certain Misclassified Claims to General Unsecured, Non-
Priority Claims) with respect to the Claim of Robert

Gentry (the "Supplement"), attached as Exhibit B to the Supplement; and the Court having determined that the relief requested in the Supplement is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that proper and adequate notice of the Objection and the Supplement has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Objection is SUSTAINED to the extent requested in the Supplement.
2. Claim number 6039 (the "Claim") is hereby modified from a class proof of claim to an individual proof of claim and reduced to \$73,365.60.
3. The Debtors right to object to any claim, including (without limitation) the Claim, on any grounds that governing law permits are not waived and are expressly reserved.

4. To the extent that this Order conflicts with the Order on Debtors' Nineteenth Omnibus Objection to Claims (Reclassification of Certain Misclassified Claims to General Unsecured, Non-Priority Claims) (D.I. 3703), this Order shall control.

5. The Debtors shall serve a copy of this Order on Robert Gentry on or before five (5) business days from the entry of this Order.

6. This Court shall retain jurisdiction with respect to all matters arising from or related to this Order.

Dated: Richmond, Virginia
_____, 2010

UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

Gregg M. Galardi, Esq.
Ian S. Fredericks, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

- and -

Chris L. Dickerson, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
155 North Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

- and -

/s/ Douglas M. Foley
Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

Counsel for Debtors and Debtors in Possession

CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)

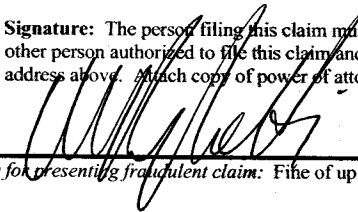
Pursuant to Local Bankruptcy Rule 9022-1(C), I hereby certify that the foregoing proposed order has been endorsed by or served upon all necessary parties.

/s/ Douglas M. Foley
Douglas M. Foley

EXHIBIT A

(The Claim)

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT Eastern District of Virginia		PROOF OF CLAIM
Name of Debtor: Circuit City Stores, Inc.		Case Number: 08-35653 (KRH)
<i>NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): Robert Gentry and all those similarly situated		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claim Number: <u>N/A</u> (If known) Filed on: _____
Name and address where notices should be sent: C/o Righetti Law Firm, P.C., Matthew Righetti 456 Montgomery Street, Suite 1400 San Francisco, CA 94104 Telephone number: (415) 983-0900		
Name and address where payment should be sent (if different from above): See above. Telephone number:		
1. Amount of Claim as of Date Case Filed: \$ <u>7,070,131.60</u> If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input checked="" type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ _____ <small>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
2. Basis for Claim: <u>See Exhibit A attached.</u> (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ _____ Annual Interest Rate _____ % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:		
Date: 01/12/2009	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. 	

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 132 and 3571.

- ☒ Date Stamped Copy Returned
- ☐ No self addressed stamped envelope
- ☐ No copy to return



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RECEIVED
JAN 13 2009

KURTZMAN CARSON CONSULTANTS

RIGHETTI LAW FIRM, P.C.

456 MONTGOMERY STREET, SUITE 1400 • SAN FRANCISCO, CA 94104

PHONE: 415.983.0900 • TOLL FREE 800.447.5549

FAX: 415.397.9005 • www.righettilaw.com

ENCLOSURE FOR YOUR INFORMATION

January 12, 2009

To: Clerk of the Court

Re: 08-35653 In re: Circuit City Stores, Inc.

Enclosed please find the original plus 2 copies of

- **PROOF OF CLAIM WITH EXHIBIT A**

Please file today and return one copy of the conformed documents to Righetti Law Firm in the self-addressed stamped envelope provided.

Please let me know if you have any problems with this filing, and thank you.

**Sincerely,
Sarah Minkus
(415) 983-0900**

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

-----X		
In re:	:	
	:	Chapter 11
CIRCUIT CITY STORES, INC., <u>et al.</u>	:	Case No. 08-35654
	:	
Debtors	:	Jointly Administered with
	:	Case No. 08-35653
-----X		

EXHIBIT A TO PROOF OF CLAIM

The case entitled Gentry v. Circuit City, Inc. was filed on August 29, 2002, in the Los Angeles Superior Court, Case No. BC280631. The case covers all California-based salaried customer service managers who worked overtime for Defendant, Circuit Stores, Inc. et al., and were not paid overtime wages from within the four years preceding the filing of the complaint and up to the time Defendants re-classified the position to non-exempt status, and thus, eligible for overtime. Mr. Gentry held the position of customer service manager for Circuit City. The company eliminated him in 2001. Mr. Gentry's ending salary was \$32,000. The calculations were arrived at by using the dates of August 29, 1998 to March 31, 2001.

To calculate the value of the Gentry v. Circuit City action the following formula was used:

Hourly rate \$15.38
x 1.5 (time and a half)
= \$23.07
x Overtime hours of 20 hours per week
= \$461.40
x work weeks (151)
= \$69,671.40
x the number of Circuit City, Inc. Stores (72 Stores)
= \$5,016,640.80

To calculate the waiting time penalties for the Gentry action the following formula was used:

Hourly rate (\$15.38)
x Hours per day (8)
x 30 Days
= \$3,691.20

x # of employees employed at Circuit City, Inc. Stores (138)
=\$509,385.60

Attorneys Fees (Righetti Law Firm, P.C.)
20% of Overtime and Waiting Time Totals
=\$1,105,205.20

Attorney's Fees (Ellen Lake) Law Office Of Ellen Lake
=\$438,900 [627 hrs]

Totals of Overtime, Waiting Time Penalties and Attorneys fees: \$7,070,131.60

EXHIBIT B

(The Gentry Complaint)

John A. Clarke, Executive Officer/Clerk
By STEPHANIE SIANEZ Deputy

MATTHEW RIGHETTI, ESQ. {121012}
EDWARD J. WYNNE, ESQ. {165819}
JOHN GLUGOSKI, ESQ. {191551}
RIGHETTI ♦ WYNNE, P.C.
456 Montgomery Street, Suite 1400
San Francisco, CA 94104
Telephone: (415) 983-0900
Facsimile: (415) 397-9005

COPY

SUPERIOR COURT OF CALIFORNIA,

LOS ANGELES COUNTY

BC280631

ROBERT GENTRY, individually
and on behalf of other members of
the general public similarly situated

NO.

CLASS ACTION

Plaintiff,

COMPLAINT

vs.

1. Violation of Labor Code;
2. Violation of B & § 17200, et seq;
3. Conversion

CIRCUIT CITY STORES, INC.,
and DOES 1 through 50, inclusive

Defendants.

FIRST CAUSE OF ACTION

COMES NOW, plaintiff, an individual over the age of eighteen (18), and brings this challenge to defendant's lucrative, repressive and unlawful business practices on behalf of himself and a class of all others similarly situated and for a Cause of Action against defendants,

1 CIRCUIT CITY STORES, INC, and DOES 1-50, inclusive, (hereinafter defendants) and each of
2 them, alleges as follows:

3
4 THE PARTIES, JURISDICTION AND VENUE

5 1.

6 This class action is brought pursuant to §382 of the California Code of Civil Procedure.
7 The monetary damages and restitution sought by plaintiff exceed the minimal jurisdiction limits
8 of the Superior Court and will be established according to proof at trial. The monetary damages
9 sought on behalf of each and every member of the class and as aggregate class damages exceed
10 those jurisdictional limits as well. However, the claims of individual class members, including
11 plaintiff, are under the \$75,000 jurisdictional threshold for federal court. For example, a class
12 member who was or has been employed for a relatively brief period could never reasonably be
13 expected to receive a recovery of \$75,000 or more. Further there is no federal question at issue,
14 as exempt status questions and remedies relating thereto are based solely on California law and
15 statutes, including the Labor Code, Civil Code, Code of Civil Procedure, and Business and
16 Professions Code.

17
18 2.

19 Venue is proper in Los Angeles County as said defendants own/owned and
20 operate/operated retail stores in the County of Los Angeles and because plaintiff worked in
21 several stores within Los Angeles (Culver City, Lakewood, etc.). Defendants' liability arose in
22 Los Angeles County and many of the wrongful acts complained of occurred in that county.
23 Plaintiff is informed and believes and thereon alleges that at all times herein mentioned
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1 defendants include both individuals who reside in California and corporations licensed to do
2 business and actually doing business in the State of California.

3
4 3.

5 Defendants own/owned and operate/operated an industry, business and establishment in
6 over 100 separate geographic locations within the State of California, including within Los
7 Angeles County, for the purpose of operating a retail store to sell goods. As such, and based
8 upon all the facts and circumstances incident to defendants' business in California, defendants are
9 subject to California Labor Code Sections 1194, et seq., 500, et seq., California Business and
10 Professions Code Section 17200, et seq., (Unfair Practices Act) and the applicable wage order(s)
11 issued by the Industrial Welfare Commission.
12

13
14 4.

15 At all times herein mentioned plaintiff and the class identified herein worked for
16 defendants as salaried customer service managers in defendant's California based retail stores.
17 The salaried customer service manager position is not a position which involves work which falls
18 within any exception to the above-referenced Labor Code sections, the Unfair Practices Act
19 and/or California Industrial Welfare Commission orders applicable to defendants' business.
20 Within the last four years, plaintiff has been an employed as a customer service manager for
21 defendants.

22 5.

23 Plaintiff does not know the true names or capacities, whether individual, partner or
24 corporate, of the defendants sued herein as DOES 1 through 50, inclusive, and for that reason,
25 said defendants are sued under such fictitious names, and plaintiff prays leave to amend this
26 complaint when the true names and capacities are known. Plaintiff is informed and believes and
27

1 thereon alleges that each of said fictitious defendants was responsible in some way for the
2 matters alleged herein and proximately caused plaintiff and members of the general public and
3 the class to be subject to the illegal employment practices, wrongs and injuries complained of
4 herein.

5 6.

6 At all times herein mentioned, each of said defendants participated in the doing of the
7 acts hereinafter alleged to have been done by the named defendants; and furthermore, the
8 defendants, and each of them, were the agents, servants and employees of each of the other
9 defendants, as well as the agents of all defendants, and at all times herein mentioned, were acting
10 within the course and scope of said agency and employment.

11 7.

12 At all times herein mentioned, defendants, and each of them, were members of, and
13 engaged in, a joint venture, partnership and common enterprise, and acting within the course and
14 scope of, and in pursuance of, said joint venture, partnership and common enterprise.

15 8.

16 At all times herein mentioned, the acts and omissions of various defendants, and each of
17 them, concurred and contributed to the various acts and omissions of each and all of the other
18 defendants in proximately causing the injuries and damages as herein alleged.

19 9.

20 At all times herein mentioned, defendants, and each of them, ratified each and every act
21 or omission complained of herein. At all times herein mentioned, the defendants, and each of
22 them, aided and abetted the acts and omissions of each and all of the other defendants in
23 proximately causing the damages as herein alleged. Further, at all times mentioned herein, the
24 wage and hour related compensation policies of stores in California are and were dictated by,
25 controlled by, and ratified by the defendants herein and each of them.

FACTUAL ALLEGATIONS

10.

Plaintiff and all members of the class identified herein were regularly scheduled as a matter of uniform company policy to work and in fact worked as salaried customer service managers in excess of eight hours per workday and/or in excess of forty hours per workweek without receiving straight time or overtime compensation for such overtime hours worked in violation of California Labor Code Section 1194 and the applicable California Industrial Welfare Commission wage order(s). Plaintiff and the other members of the class were improperly and illegally mis-classified by defendants as "exempt" managerial/executive employees when, in fact, they were "non-exempt" non-managerial employees according to California law. Plaintiff and the other members of the class have the right to be compensated by defendants at the appropriate compensatory wage rate for said work heretofore performed, consisting of the straight time rate plus the appropriate overtime premium as mandated by California law.

11.

This complaint is brought by plaintiff pursuant to California Code of Civil Procedure section 382 on behalf of a class. All claims alleged herein arise under California law for which plaintiff seeks relief authorized under California law. The class is comprised of, and defined as:

All California based salaried customer service managers who worked overtime for defendants and were not paid overtime wages from within the four years preceding the filing of this complaint and up to the time defendants re-classified the position to non-exempt status.

The members of the class are so numerous that joinder of all members would be impractical, if not impossible. The members of the class are readily ascertainable by a review of defendants' records. Further, the subject matter of this action both as to factual matters and as to matters of law, are such that there are questions of law and fact common to the class which predominate over questions affecting only individual members including, among other things, the following:

1 a. Statistically, one hundred percent of the class members were paid on a salary basis
2 with no overtime compensation paid for work accomplished in excess of forty hours per week, or
3 eight hours per day. Plaintiff is informed and believes and based thereon alleges that all class
4 members failed to meet the exemption requirements of California law such as 1) regularly spend
5 more than 50% of their time performing exempt work; 2) customarily and regularly exercised
6 discretion and independent judgment and; 3) have authority to hire and fire. Thus, plaintiff and
7 the class members were not exempt from the overtime requirements of California law for that
8 reason;

9 b. Defendants uniformly administered a corporate policy concerning both staffing
10 levels and duties and responsibilities of the class members which required that the class members
11 both work overtime without pay and regularly spend more than 50% of their time performing
12 non-exempt tasks. This included a uniform corporate pattern and practice of allocating and
13 authorizing inadequate staffing levels at the individual stores. This corporate conduct had the
14 effect of placing customer service and other clerical "non-management" duties and
15 responsibilities onto the shoulders of the class members who were customarily and regularly
16 caused to work far in excess of forty hours in a week and/or eight hours in a day without pay.
17 Thus, plaintiff and all other members of the class routinely, regularly and customarily (i.e., well
18 in excess of 50% of their work time) performed non-exempt, non-managerial work and work that
19 did not regularly involve discretion and independent judgment. Therefore, such employees are
20 entitled to overtime compensation under California law.

21 c. The duties and responsibilities of the salaried customer service manager position
22 at the defendants' stores were virtually identical from region to region, district to district, store to
23 store, and, employee to employee. Further, any variations in job activities between the different
24 individuals in these positions are legally insignificant to the issues presented by this action since
25 the central facts remain, to wit: these employees performed non-exempt work in excess of 50%
26 of the time in their workday, these employees did not regularly exercise discretion and
27

1 independent judgment; these employees' work routinely included work in excess of 40 hours per
2 week and/or 8 hours per day and they were not, and have never been, paid overtime
3 compensation for their work.

4 d. With respect to those members of the class who were discharged by defendants or
5 voluntarily quit, and did not have a written contract for employment. The defendants, in
6 violation of California Labor Code Sections 201, and 202, et seq., respectively, had a consistent
7 and uniform policy, practice and procedure of willfully failing to pay the earned and unpaid
8 wages of all such former employees. The defendants have willfully failed to pay the earned and
9 unpaid wages of such individuals, including, but not limited to, regular time, overtime, and other
10 wages earned and remaining uncompensated according to amendment, or proof.

11 12.

12 As a pattern and practice, also in violation of the aforementioned labor laws and wage
13 orders, defendants did not maintain any records pertaining to when salaried customer service
14 managers began and ended each work period, meal period, the total daily hours worked, and the
15 total hours worked per pay period and applicable rates of pay.

16 13.

17 There are predominant common questions of law and fact and a community of interest
18 amongst plaintiff and the claims of the absent class members concerning whether defendants'
19 regular business custom and practice of requiring substantial "overtime" work and not paying for
20 said work according to the overtime mandates of California law is, and at all times herein
21 mentioned was, in violation of California Labor Code Sections 1194 and 500, et seq., the Unfair
22 Practices Act and the applicable California Industrial Welfare Commission wage orders.
23 Defendants' employment policies and practices wrongfully and illegally failed to compensate
24 salaried customer service managers for substantial overtime compensation earned as required by
25 California law. For instance, questions of fact and/or law common to the members of the
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1 aforesaid class -- which predominate over any questions which may affect only individual
2 members -- are:

3 i. Whether defendants' salaried customer service managers were classified as
4 "exempt" in violation of California law;

5 ii. Whether defendants uniformly failed to pay overtime wages to its salaried
6 customer service managers by virtue of defendants' unlawful class wide designation of such
7 employees as "exempt" in violation of California law;

8 iii. Whether plaintiffs and the class could waive the wage and hour laws
9 designed for their benefit under California law, whether such waivers violate public policy and
10 whether such waivers were voluntary, knowing and valid;

11 iv. Whether defendants' conduct constituted an illegal, or unfair, business
12 practice in violation of California law;

13 v. Whether plaintiff and the class are entitled to compensatory damages
14 pursuant to the California Labor Code;

15 vi. Whether plaintiff and the class are entitled to injunctive relief, including
16 restitution and/or disgorgement of profits pursuant to California law.

17 vii. What is the correct computation formula for the payment of overtime in
18 California as to salaried workers?

19 viii. What work is customarily and regularly accomplished by class members in
20 defendants' stores and what category (exempt or non-exempt) does that work properly fall into?

21 ix. What are the realistic requirements of the customer service manager job?

22 x. What are the expectations of defendants vis-à-vis the class members job
23 performance?

24 xi. Who has the burden of proof on the exemption issue?
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xii. Can defendant rely on the "sole charge" or "primary duty" exemption standards applicable under federal law, or must defendant comply with California's more strict quantitative exemption standards?

14.

The claims of plaintiff are typical of the claims of all members of the class. Plaintiff, as a representative party, will fairly and adequately protect the interests of the class by vigorously pursuing this suit through attorneys who are skilled and experienced in handling civil litigation of this type.

15.

The California Labor Code and wage order provisions upon which plaintiff asserts these claims are broadly remedial in nature. These laws and labor standards serve an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting onerous terms and conditions of employment. The nature of this action and the format of laws available to plaintiff and members of the class identified herein make the class action format a particularly efficient and appropriate procedure to redress the wrongs alleged herein. If each employee was required to file an individual lawsuit, the corporate defendants would necessarily gain an unconscionable advantage since it would be able to exploit and overwhelm the limited resources of each individual plaintiff with its vastly superior financial and legal resources. Requiring each class member to pursue an individual remedy would also discourage the assertion of lawful claims by employees who would be disinclined to file an action against their former employer for real and justifiable fear of retaliation and permanent damage to their careers at subsequent employment.

16.

The prosecution of separate actions by the individual class members, even if possible, would create a substantial risk of (1) inconsistent or varying adjudications with respect to individual class members against the defendants and which would establish potentially incompatible standards of conduct for the defendants, and/or (2) adjudications with respect to individual class members which would, as a practical matter, be dispositive of the interests of the other class members not parties to the adjudications or which would substantially impair or impede the ability of the class members to protect their interests. Further, the claims of the individual members of the class are not sufficiently large to warrant vigorous individual prosecution considering all of the concomitant costs and expenses.

17.

Such a pattern, practice and uniform administration of corporate policy regarding illegal employee compensation, as described herein, is unlawful and creates an entitlement to recovery by the plaintiff and the class identified herein, in a civil action, for the unpaid balance of the full amount of the straight time compensation and overtime premiums owing, including interest thereon, willful penalties, reasonable attorneys fees, and costs of suit according to the mandate of California Labor Code Section 1194, et seq.

18.

Proof of a common business practice or factual pattern, of which the named plaintiff's experiences are representative, will establish the right of each of the members of the plaintiff class to recovery on the causes of action alleged herein.

19.

The plaintiff class is entitled in common to a specific fund with respect to the overtime compensation monies illegally and unfairly retained by defendants. The plaintiff class is entitled in common to restitution and disgorgement of those funds being improperly withheld by

1 defendants. This action is brought for the benefit of the entire class and will result in the creation
2 of a common fund.

3 WHEREFORE, Plaintiff on his own behalf and on behalf of the members of the class,
4 prays for judgment as hereinafter set forth.

5
6 **SECOND CAUSE OF ACTION**

7 COME NOW, plaintiff, individually and on behalf of both the class and the general
8 public and as a second, separate and distinct cause of action against defendants, and each of
9 them, alleges as follows:

10 20.

11 Plaintiff herein repeats and re-alleges as though fully set forth at length each and every
12 paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause
13 of action for relief regarding defendants' violations of Business and Professions Code 17200 et
14 seq. (Unfair Practices Act).

15 21.

16 Defendants, and each of them, have engaged in unfair business practices in California by
17 practicing, employing and utilizing the employment practices outlined in Paragraphs 10 through
18 13, inclusive, to wit, by requiring their salaried customer service managers to perform the labor
19 services complained of herein without overtime compensation. Defendants' utilization of such
20 unfair business practices constitutes unfair competition and provides an unfair advantage over
21 defendants' competitors. Plaintiff -- and other similarly situated members of the general public --
22 seek full restitution and disgorgement of monies, as necessary and according to proof, to restore
23 any and all monies withheld, acquired and/or converted by the defendants by means of the unfair
24 practices complained of herein. Plaintiff seeks, on his own behalf and on behalf of the general
25 public, the appointment of a receiver, as necessary. The acts complained of herein occurred, at
26

1 least in part, within the last four (4) years preceding the filing of the original complaint in this
2 action.

3 22.

4 Plaintiff is informed and believes and on that basis alleges that at all times herein
5 mentioned defendants have engaged in unlawful, deceptive and unfair business practices, as
6 proscribed by California Business and Professions Code section 17200, including those set forth
7 in Paragraphs 10 through 13 herein thereby depriving plaintiff and other members of the general
8 public the minimum working condition standards and conditions due to them under the
9 California labor laws and Industrial Welfare Commission wage orders as specifically described
10 herein.

11 23.

12
13 Plaintiff, and all persons similarly situated, are further entitled to and do seek a both a
14 declaration that the above-described business practices are unfair, unlawful and/or fraudulent and
15 injunctive relief restraining defendants from engaging in any of such business practices in the
16 future. Such misconduct by defendants, unless and until enjoined and restrained by order of this
17 Court, will cause great and irreparable injury to all members of the class in that the defendants
18 will continue to violate these California laws, represented by labor statutes and IWC Wage
19 Orders, unless specifically ordered to comply with same. This expectation of future violations
20 will require current and future employees to repeatedly and continuously seek legal redress in
21 order to gain compensation to which they are entitled under California law. Plaintiff has no other
22 adequate remedy at law to insure future compliance with the California labor laws and wage
23 orders alleged to have been violated herein.
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THIRD CAUSE OF ACTION

COME NOW, plaintiff, individually and on behalf of a class and as a third, separate and distinct cause of action against defendants, and each of them, alleges as follows:

24.

Plaintiff herein repeats and re-alleges as though fully set forth at length each and every paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause of action for Conversion.

25.

At the time defendants refused to pay the wages due to plaintiff and the class, as alleged herein. Plaintiff owned and had the right to possess the withheld wages. Defendants willfully and without legal justification interfered with plaintiff's right to own and possess her wages. The exact amount of those wages is capable of being made certain from a review of either the information of plaintiff and class members, or from the records of defendants.

26.

In refusing to pay wages to the plaintiff and the class defendants unlawfully and intentionally took and converted the property of plaintiff and the class to their own use. At the time the conversion took place plaintiff and the class were entitled to immediate possession of the amounts of wages payable. This conversion was oppressive, malicious and fraudulent. This conversion was concealed by the defendants from the plaintiff and the class.

27.

Plaintiff and the class have been injured by this conversion and are entitled to: (1) all monies converted by the defendants with interest thereon; (2) any and all profits whether direct or indirect, the defendants acquired by their conversion; (3) punitive and exemplary damages.

WHEREFORE, plaintiff on his own behalf and on behalf of the members of the class and the general public, prays for judgment as follows:

1. For an order certifying the proposed class and sub-classes;

2. Upon the First Cause of Action, for damages according to proof as set forth in California Labor Code Section 1194, et seq. (and the applicable California Industrial Welfare Commission wage orders) related to wages due and owing and for restitution to plaintiff and the class, including waiting time penalties owed;

3. Upon the Second Cause of Action, for full restitution and disgorgement of monies, as necessary and according to proof, to restore any and all monies withheld, acquired and/or converted by the defendants by means of the unfair practices complained of herein to plaintiff and other similarly effected members of the general public (and disgorgement from defendants) of all funds acquired by defendants by means of any acts or practices declared by this Court to be violative of the mandate established by California Business and Professions Code section 17200, et seq. Plaintiff seeks, on his own behalf and on behalf of the general public, the appointment of a receiver, as necessary.

4. Upon the Second Cause of Action, that defendants be ordered to show cause why they should not be enjoined and ordered to comply with the applicable California Industrial Welfare Commission wage orders and labor code laws related to payment of overtime compensation and record keeping for defendants' salaried customer service manager personnel who are primarily engaged in non-exempt non-discretionary work and work more than 40 hours per week or 8 hours per day, and for an order enjoining and restraining defendants and their agents, servants and employees related thereto;

5. Upon the Second Cause of Action, for the appointment of a receiver to receive, manage and distribute any and all funds disgorged from the defendants determined to have been wrongfully acquired by the defendants as a result of violations of California Business and Professions Code section 17200 et seq.;

6. Upon the Third Cause of Action, for (1) all monies converted by the defendants with interest thereon; (2) any and all profits whether direct or indirect, the defendants acquired by their conversion; (3) punitive and exemplary damages.

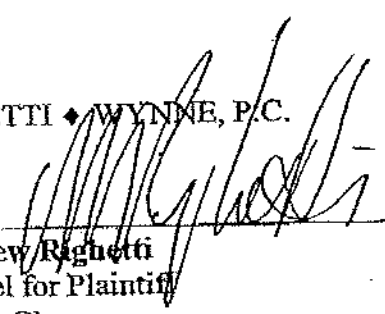
7. For pre-judgment interest as allowed by California Labor Code Sections 1194 and 218.6 and California Civil Code § 3287 for all class members (b), for waiting time penalties as authorized by California Labor Code Section 203 for those individuals no longer employed by defendants;

8. For reasonable attorneys fees, expenses and costs as provided by California Labor Code Section 1194, et seq. and other applicable California laws; and,

9. For such other and further relief the court may deem just and proper.

DATED: August 28, 2002

RIGHETTI ♦ WYNNE, P.C.


Matthew Righetti
Counsel for Plaintiff
and the Class